No. 75-402

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

TROY HONEYCUTT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Troy Honeycutt, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming his conviction under 18 U.S.C., Section 1623, for making a false material declaration before a federal grand jury.

OPINION BELOW

The opinion of the Court of Appeals is printed as an Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1975. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

Can a conviction stand on an indictment charging a witness with having made a false material declaration, where the declarant was forced to deliver money to armed men whose admitted motive was to obtain money feloniously from the declarant, and where the false declaration was alleged to be declarant's assertion that he did not "pay" such men the money, contending at trial that he regarded the transaction as a hold-up in which money was stolen from him?

Assuming that a witness can truthfully say that he did not "pay" a holdup man, does his statement that he did not "pay", constitute a false declaration merely because the armed men were police officers, charged with regulating the witness' tavern business, in the course of going about their other business of extorting money from the witness by threat?

NATURE OF THE CASE

Petitioner was convicted of making a false material declaration in denying before a federal grand jury that he "paid" money to Chicago police officers, in violation of 18 U.S.C. Section 1623.

STATEMENT OF FACTS

At successive grand jury appearances petitioner Honeycutt, a Chicago tavern keeper, denied that he "paid" money to Chicago police officers. (Tr. 54-62, 68-73).

At trial, policeman witness Frank Bychowski related that he had obtained money from tavern keeper Honeycutt, by telling him that he was of the impression that Honeycutt ". . . wanted to be a friend of ours . . ." and that he "assumed" that Honeycutt was willing to pay $50 per month, explaining to Honeycutt that he would still be liable for law violations in his tavern. (Tr. 82-85).

On cross examination Bychowski agreed that armed robbery entailed taking money from a victim when armed, and motivated by a felonious intent. He admitted that he had such an intent in getting Honeycutt's money, and that he was armed when he did so. (Tr. 95-104).

Honeycutt testified that in denying that he had "paid" money to the police, he did so considering his answers to be literally and technically true (Tr. 246-247); that he made a distinction between "payment" and handing money over in the course of a hold up (Tr. 230-231) and further considering that the money was not turned over for goods or services, proper or improper (Tr. 244-245).

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Seventh Circuit has so interpreted Section 1623 of Title 18 U.S. Code as to give it the meaning that an answer given under oath, which is not literally false, will nevertheless support a prosecution for making a false material declaration provided the declarant did not believe his assertion to be true when he made it.

In this case the Court of Appeals read into the false declaration statute, 18 U.S.C. Sec. 1623, the wording employed in 18 U.S.C. Sec. 1621, the perjury statute.

The latter statute (1621) defines an offense of willfully testifying to a matter which a witness does not then believe to be true. Prior to *Bronston* v. *United States,* 409 U.S. 352 (1973) a witness who testified truthfully, but who believed his answer to be false, could be convicted of perjury. (See, for example, *United States* v. *Lattimore,* 127 F. Supp. 405, 408, n.10 (D.D.C. 1955)). The thrust of the perjury statute was thus to punish a moral deviance in the witness. As we read *Bronston,* this Court held that regardless of the statutory language which seemed to compel that conclusion, perjury would not be punishable unless the statement were in fact false, regardless of evil intent in the witness.

Section 1623, Title 18 U.S. Code requires not only an intent to falsify, but actual falsification. Literal truth, however firmly the witness might believe himself to have lied, is a complete defense.

In its opinion, the Court of Appeals dwells upon the proposition that Honeycutt's "understanding" of the meaning of the word "paid" is determinative of the case. Thus the court held that "The jury must determine what

the defendant's understanding of the word 'pay' was, and *using that meaning,* decide whether his response was true or false." (App. 3, emphasis supplied). It makes no difference under the new section whether or not the witness intended to mislead or even to lie. If his answer is not literally false, then he may not be convicted.

It may be noteworthy that the court did not rely on cases brought under 18 U.S.C. Sec. 1623, but upon cases brought under the older perjury statute.

Regardless of the witness' "understanding" as to what his questioner means by the words he uses, the witness is bound and only bound, not to make literally false statements. It is not literally false to deny that one "paid" a stickup man. The officers who testified against petitioner were literally that. The fact that government gives such men immunity to testify against their victims (as it did here) or rewards their not-so-atypical misbehavior as public officials (as the town of Bayfield, Wisconsin did when it thereafter hired Bychowski as its Chief of Police) does not mean that stickup men are not stickup men. It only means that public office holders stand by each other through thick and thin. Probably on the theory that I will not treat you as a felon when you are discovered today, in the hope that you will not treat me as a felon when I am discovered tomorrow.

Bychowski & Co. were robbers, pure and simple. It is not improbable that Honeycutt knew exactly what the questioner meant by the use of the word "paid". "Paid" is after all, the word public officials would be *expected* to use when describing the process of loot gathering by other public officials. But honest citizens are not required to adopt the deceptive argot of uniformed robbers and their sympathizers in government.

The word 'pay'' and its cognates describes a set of special relationships. Had the government ever asked Honeycutt if the officers ''obtained'' money from him, his denial would plainly have been false. But the relationship was not appropriate to the use of ''pay.'' One does not ''pay'' the man who holds him up. One stands and delivers. Among the dictionary synonyms for ''pay'' is not to be found a word that is appropriate to transfers of currency by theft. Whether or not the prosecution and the Court of Appeals wish to limit the words descriptive of violent felony to felons either permanently or temporarily out of office, each has now taken a bold step in that direction.

A favorite way for an office holder to obtain money dishonestly is by accepting a bribe. A bribe is said to be ''paid.'' Had Honeycutt stated he had ''paid'' the officers, he would inferentially have conceded that he bribed them. But there was no evidence whatever that the money he handed over performed the function of a bribe. Indeed, he was told that he would be subject to criminal prosecution for any violation of law he might commit. Yet the government, which makes some claim to protecting the citizenry, insists that a citizen, wrongfully compelled to hand over money to a public official, should confess to criminal complicity with that official at the hazard of the official's proclaiming the citizen's complicity, himself under a grant of immunity thoughtfully supplied by another official.

Something has gone very wrong in the law enforcement business, when a self proclaimed rapist can procure his asserted victim's conviction for the crime of denying under oath that she was raped.

That is the precise posture of this case.

CONCLUSION

For the foregoing reasons we pray the Court will deem this case worthy of review, to the end that the conviction herein may be reversed.

Respectfully submitted,

FRANK OLIVER
MITCHELL CAPLAN
Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
(Argued April 17, 1975)
August 14, 1975

Before
Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 74-1958 *vs.*

TROY HONEYCUTT,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division
No. 74 CR 136
WILLIAM J. LYNCH, *Judge.*

ORDER

Appellant, Troy Honeycutt, was convicted by a jury on two counts of perjury before a grand jury in violation of 18 U.S.C. §1623.[1] The grand jury was investigating ex-

[1] The relevant portion of 18 U.S.C. §1623 states that: "whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly make any false material declarations . . . shall be fined . . . or imprisoned. . . ."

tortion allegedly perpetrated by Chicago police officers against local tavern owners.

The two-count indictment charged that Troy Honeycutt, owner of the Vanity Fair Tavern, did knowingly make false material declarations before the federal grand jury on July 12, 1973 and December 7, 1971. Both counts allege that Honeycutt testified falsely when he denied that he had been approached by police officers to "pay" money in connection with his business, the Vanity Fair Tavern.[2]

The evidence presented clearly established that Honeycutt turned money over to various Chicago policemen in response to solicitation amounting to extortion. He argues that transfers so motivated were not payments and either, that his answers were literally true; or that the word "pay" is so inherently ambiguous that the government had the burden of alleging and proving the particular meaning intended at the time of the testimony.

The petitioner's reliance on *Bronston* v. *United States,* 409 U.S. 352 (1973) is inapposite. *Bronston* narrowly held that an unresponsive but literally true answer cannot be the basis of a perjury conviction even where the defendant is intentionally trying to and does successfully mislead the questioner. In ordinary usage, "payment" includes a transfer of money motivated as Honeycutt's was, even though it would also include transfers of money otherwise motivated. We are neither faced with an unresponsive answer nor an answer which is literally true on its face, as in *Bronston* v. *United States, supra.*

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[2] In addition, both counts charged that the defendant denied that he "paid"; that he had made "payments"; or that he had knowledge of other tavern owners "paying" money to police officers as part of an extortion plan.

A perjury conviction which is based on a phrase that does not have a "meaning about which men of ordinary intellect could agree, . . . [or] one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony" must be reversed. *United States* v. *Lattimore,* 127 F.Supp. 405, 410 (D.D.C. 1955), *aff'd,* 232 F.2d 334 (D. C. Cir. 1955). This clearly is not the situation here.

The word "pay" neither is prone to widely divergent views nor necessitates a purely subjective interpretation as did the phrase "follower of the Communist line" in *Lattimore, supra.* Absent a word or phrase which is fundamentally ambiguous, the mere fact that a party contends that he accorded a different meaning to a word than did the questioner, is not sufficient to foreclose a jury from determining the meaning that the defendant attributed to that word. *United States* v. *Diogo,* 320 F.2d 898, 907 (2nd Cir. 1963); *see also, Seymour* v. *United States,* 77 F. 2d 577 (8th Cir. 1935). We cannot say, as a matter of law, that defendant was not bound, at the time of his testimony, to understand the word "payment" as including a transfer of money in the context of extortion. Moreover, the content of statements by the foreman of the grand jury and Honeycutt's testimony before grand jury tended to show that everyone involved used the word "payment" to include a transfer of money prompted by an extortion.

The jury must determine what the defendant's understanding of the word "pay" was and, using that meaning, decide whether his response was true or false. *United States* v. *Wall,* 371 F.2d 398 (6th Cir. 1967); *see also, United States* v. *Lattimore,* 127 F.Supp. 405, 410 (D.D.C. 1955), *aff'd,* 232 F.2d 334 (D.C. Cir. 1955). If false, the jury must

then decide if the response was made knowing it to be false. Only when the statement is false, as determined by the defendant's understanding of the words used, and is made knowing it to be false will a perjury conviction under 18 U.S.C. §1623 be affirmed.

We feel that whether defendant's understanding of the meaning of "payment" excluded a transfer in response to extortion, as he claimed, was a jury question.

Appellant argues that "Government Instruction No. 6"[3] constituted plain error because it assumes the defendant's declaration to be false. No objection to this instruction was raised at trial and therefore one cannot be raised on appeal unless the error was "evident or obvious." See, Fed.R.Crim.P. (30) and (52b), 18 U.S.C.A.; *United States* v. *Jansen,* 475 F.2d 312, 318 (7th Cir. 1973), *cert. denied,* 414 U.S. 826. *See also, United States* v. *Hood,* 493 F.2d 677, 682 (9th Cir. 1974), *cert. denied,* 419 U.S. 852. We do not see how the jury could have been misled by this instruction into the view that the judge was either foreclosing the defendant's claim as to his understanding of the meaning of the word "pay," or charging the jury to the effect that the defendant's answers were false.

Government Instruction No. 6 merely presented the elements which must be proved under 18 U.S.C. §1623. Subsequent instructions, specifically Government Instructions No. 8 and 19B, explain these elements and take into

[3] To convict the defendant, the government must have proven beyond a reasonable doubt as to the count then under consideration by you:

(3) That the defendant then and there knowingly and contrary to his oath made the false material declaration set forth in that count.

consideration the defendant's interpretation of the word "pay." We find no error with this instruction, and certainly there was no "plain error."

Appellant next attacks Government Instruction No. 19B as erroneously stating that the word "pay" and its derivatives are not "fundamentally ambiguous." In this context the phrase "fundamentally ambiguous" does not mean that the words used cannot have more than one meaning, but instead it implies that meaning can be attributed to the word "pay" without resorting to a purely subjective interpretation by the jury as in *Lattimore* v. *United States, supra.*

Appellant further argues that a sentence in Government Instruction No. 19b[4] directs the jury to enter a guilty verdict. We disagree. This sentence is indeed awkward, especially when read alone, but when viewed in the context of the overall charge an improper view is not likely to be formed.

Appellant also complains that the trial judge erroneously failed to charge the jury as requested. We find no merit in this contention. The proffered defense instructions were in part erroneous and in part confusing. Those instructions that were meritorious were adequately covered by the instructions that were given.

Jury instructions cannot be read in isolation on appeal, ". . . but must be viewed in the context of the overall charge." *Cupp* v. *Naughten,* 414 U.S. 141, 147 (1973).

[4] "If you do not find that the declarant was misled or construed or interpreted words and/or phrases in such a manner that the allegedly false declarations were not believed by the defendant to be false when made then the false declaration is wilful."

Reading the entire charge as a whole we are convinced that the jury, aware of the appellant's claimed understanding of the word "pay," found that he knowingly made a false declaration to the grand jury. Moreover, in reviewing jury instructions, the charge must be viewed as part of the whole trial. *United States* v. *Park*, ... U.S. ....., 43 U.S.L.W. 4687, 4692 (1975). Throughout the entire trial the jury was made aware of the defendant's claimed conception of the word "pay." Nevertheless, after taking this into account, the jury determined that the defendant knowingly made a false declaration.

Viewed as a whole in the context of the trial we do not find the charge misleading.

The Clerk of this court is directed to enter judgment affirming the judgment of the district court.

APPENDIX B

The statutory provisions referred to herein read, in pertinent part:

18 U.S.C. Sec. 1621:

"Whoever, having taken an oath . . . in any case in which a law of the United States authorizes an oath to be administered, that he will testify . . . truly . . . and contrary to such oath states . . . any material matter which he does not believe to be true, is guilty of perjury . . ."

18 U.S.C. Sec. 1623:

"Whoever under oath . . . before . . . [a] grand jury of the United States knowingly makes any false material declaration . . . shall be fined . . . or imprisoned."

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TROY HONEYCUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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TROY HONEYCUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on two counts of making material false declarations before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to concurrent terms of four months' imprisonment, to be followed by two years' probation. The court of appeals affirmed (Pet. App. A). Petitioner contends that his conviction must be reversed because the declarations were literally true.

The grand jury was investigating extortion allegedly perpetrated by Chicago police officers against local tavern owners. Petitioner, a tavern owner, denied at two separate sessions of the grand jury that he had been asked by officers to pay money to them, or that he had paid or made payments to them. The evidence, as the court of appeals noted (Pet. App. 2), clearly established that petitioner had

turned money over to various policemen in response to solicitation amounting to extortion. Petitioner's defense was that he believed his answers before the grand jury to be true. He contended that, since the officers were armed, he had not "paid" them, but simply had surrendered money in the course of what he considered to be an armed robbery.

The jury was instructed that it could convict petitioner only after concluding that petitioner understood the sense in which the word "pay" had been used in the questions directed to him, and that petitioner knowingly had given false responses (see Pet. App. 5-6). The jury concluded that petitioner had understood the sense in which "pay" and "paid" had been used in the questions. Petitioner's contrary assertions (Pet. 3-6) seek a redetermination by this Court of a factual issue resolved adversely to him by the jury.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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[1]This is not a case like *Bronston* v. *United States*, 409 U.S. 352, in which the witness' answer, although intended to mislead, was nonresponsive and literally true. The answers in this case were responsive and clearly false, so long as petitioner understood the everyday sense in which the terms in the questions had been used—and the jury determined that he had so understood them.

There is no merit to petitioner's apparent argument that, as a matter of *law*, the word "pay" cannot be used to describe the tender of money to an extorter. This argument seems to rest upon the assertion that extortion by police officers is "armed robbery" if the officers are armed at the time of the extortion. But although the extorting officers were armed, petitioner paid as demanded because of fear created by the officers' implied threat to take official action against him, and not because he feared that they would use their weapons. And even if the extortion were "armed robbery" as a matter of law, that could not affect the ordinary language meaning of the words used in the questions put to petitioner.

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